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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 179.

ALGERNON S. BADGER, COLLECTOR OF THE PORT OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

A. CUSIMANO & COMPANY, A COMMERCIAL FIRM COMPOSED OF ANGELO CUSIMANO AND CHARLES P. ADONE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 24, 1885.

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United States of America, circuit court of the United States, eastern district of Louisiana.

A. CUSIMANO & Co.
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

A. H. Leonard, U. S. attorney, for plaintiff in error; Singleton, Browne & Choate, for defendants in error.

Writ of error returnable to the Supreme Court of the U. S., at the city of Washington, D. C., on the second Monday of October, A. D. 1885.

1 *Petition and statement, filed May 16th, 1885.*

To the hon. the judges of the circuit court of the United States, fifth circuit, eastern district of Louisiana.

The petition of A. Cusimano & Co., a commercial firm domiciled and doing business in the city of New Orleans, State of Louisiana, and composed of Angelo Cusimano and Charles P. Adone, both residents of New Orleans (the former is a subject of the Kingdom of Italy, and the latter a citizen of Louisiana), respectfully shows:

That Algernon S. Badger (collector of the port of New Orleans), who resides in New Orleans, is indebted unto your petitioner in the sum of fourteen hundred and *and* $\frac{07}{100}$ dollars, with legal interest from judicial demand for this:

That your petitioners are large dealers in foreign fruits, and did, during the years 1883 and 1884, import into the United States, the port of New Orleans, several large cargoes of Valencia oranges per steamships Pontiac, North Anglia, Vindolano, and Ehrenfels, aggregating twenty thousand one hundred and sixty-five cases, which were over 2½ cubic feet each. That the invoice values of said oranges was 177,310 pesentas, and the invoice value of the charges (composed of value of cases, nails, packing, bands, cost of transportation, etc.) was 120,990 pesentas, making the total invoice of fruit and charges 298,300 pesentas, all of which names of steamships by which imported, invoice value of fruit, and invoice
2 value of charges, with dates of invoices and entries, are set forth specifically and in detail per tabulated statement herewith filed, made a part hereof, and marked "Valencia oranges."

That said fruit was duly entered by your petitioner as it arrived in the customs department at New Orleans, the fruit at its true invoice value and the charges at their true invoice value, and, altho the said fruit was entered in said customs department at its proper invoice value, the said A. S. Badger, in his capacity as collector caused an appraisement of each importation of said fruit to be made, despite the protest and remonstrance of your petitioner, and thereby increased the invoice value of said fruit and

reduced the invoice value of the charges in each, increasing the value of the fruit by just so many pesetas as the invoice value of the charges was reduced, making a total increase in the values of said twenty thousand one hundred and sixty-five cases of fruit of 36,271.15 pesetas, equal in American coin to $7,000.33, upon which your petitioner was obliged to pay 20 % duties, making the sum of fourteen hundred and $\frac{07}{100}$ dollars, which the said Badger illegally and wrongfully compelled your petitioner to pay.

Your petitioner shows that the said Badger did not pretend that there was any mistake or fraud in said invoice value of said fruit, or that the market value thereof was not thereby truly represented, but arbitrarily, and in direct violation of his duties and contrary to the law, he caused such appraisement to be made.

Your petitioner shows that so soon as the liquidation of each and all of said entries were made by the customs department
3 at New Orleans, and within 30 days thereafter, they appealed from the decision of said Badger to the Secretary of the Treasury of the United States.

That the Secretary of the Treasury received said appeals of your petitioner in due course of mail, and on the 18th February, 1885, decided that while it appeared that the "fruit in question was invoiced at a value which properly represented its market value; but that the value of the boxes, packing, &c., was excessive, and was reduced by the appraiser, and the value of the fruit advanced to the same extent," and affirmed the action of said Badger.

Your petitioner shows that the invoice value of said fruit was the true market value at the dates of the respective importations, and was correctly entered; that on the value of the fruit alone the law requires a duty of 20 % to be paid, and that, according to law, no duty is required on the invoice value of the charges when the cases exceed $2\frac{1}{2}$ cubic feet each.

That by the illegal and wrongful action of the said Badger your petitioner has been compelled to pay 20 % duties on $7,000.33, valuation deducted from the "charges" and added to the "fruit," thereby forcing them to pay $1,400.07 duties on an amount which represented "charges" only, and on which the law does not require any duty. That by reason of said illegal and wrongful acts, and the said Badger not being authorized by law to exact said sum, the said Algernon S. Badger is indebted to your petitioner in said sum of fourteen hundred and $\frac{07}{100}$ dollars.

Wherefore your petitioner prays that he be cited and, after due proceedings, condemned to pay your petitioner the sum of fourteen hundred and $\frac{07}{100}$ dollars, with legal interest from judicial demand, & costs and for general relief.

(Signed) SINGLETON, BROWNE & CHOATE,
Attys. for Pet'n'r.

4 *Exhibit filed with petition May 16th, 1885.*

"VALENCIA ORANGES."

Name of steamer.	Date of invoice.	Date of entry.	No. of cases.	Invoice value fruit.	Invoice value charges.	Total value.	Increase value fruit by appraisement.	Reduction value of charges.
				Pesetas.	*Pesetas.*	*Pesetas.*	*Pesetas.*	*Pesetas.*
Pontiac	Nov., 1883	Dec. 21, 1883	3,283	27,925.50	19,698	47,623.50	6,730.15	6,730.15
Norfolk	Dec. 13, 1883	Jan. 11, 1884	4,290	36,431	25,716	62,147	7,500	7,500
North Anglia	Dec. 24, 1883	Jan. 23, 1884	5,677	48,254.50	34,062	82,316.50	9,934	9,934
" "	" " "	Jan. 23, 1884	150	1,275	900	2,175	262	262
Vindolano	Jan. 10, 1884	Feb. 7, 1884	2,050	17,501.50	12,354	29,858.50	3,602	3,602
Ehrenfels	Jan. 22, 1884	Feb. 19, 1884	4,710	45,922.50	28,260	74,182.50	8,243	8,243
			20,165					

Name of steamer.	Total value fruit by appraisement.	Additional value of fruit liable to 20 % duty by appraisement.	Total additional, subject to duty by appraisement in American coin.	Total duties paid in excess of amt. due on orig'l invoice of fruit, @ 20 %, charges not being subject to duty.
	Pesetas.	*Pesetas.*		
Pontiac	34,655.55	6,730.15	$1,298.91	252.79
Norfolk	36,431	7,500	1,447.50	288.50
North Anglia	58,188.50	9,934	1,917.26	382.45
" "	1,537.00	262	50.57	10.11
Vindolano	21,103.50	3,602	695.19	139.03
Ehrenfels	54,165.60	8,243	1,590.90	318.18
Total advance			$7,000.33	@20 % duty, $1,400.06

5 *Answer, filed May 27th, 1885.*

A. CUSIMANO & Co.
vs.
A. S. BADGER, COLL'R, &C. } No. 11029. U. S. circuit court.

Defendant for answer to plaintiffs' petition denies all and singular allegations thereof; prays that plaintiffs' demand be rejected and to be herein dismissed with costs.

(Signed) A. H. LEONARD,
U. S. Att'y.

Entering order continuance—Extract from the minutes. April term, 1885.

NEW ORLEANS, *Thursday, June 11th*, 1885.

Court met pursuant to adjournment.
Present, Hon. Aleck Boarman, district judge.

A. CUSIMANO & Co.
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

Ordered, that the above-entitled cause, not reached this day for want of time, lay over until to-morrow at 11 a. m.

Entering order continuance—Extract from the minutes of June 12th, 1885.

6 A. CUSIMANO
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

The above entitled and numbered cause not having been reached for want of time, ordered that the same lay over until Monday next, 15th inst., at 11 a. m.

Entering order continuance—Extract from the minutes of June 15th, 1885.

A. CUSIMANO
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

Ordered, that the foregoing cause, not reached to-day for want of time, be continued until to-morrow at 11 a. m.

Hearing and submission—Extract from the minutes of June 16th, 1885.

A. CUSIMANO & CO.
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

This cause was called for trial. Singleton, Brown, & Choate, for plaintiffs; A. H. Leonard, U. S. attorney, for defendant.

7 When the following jurors were called and sworn to well and truly try the issue joined herein:

1. Peter Coyle.	5. Jas. M. Broadwell.	9. Edgar Fasman.
2. A. F. Nolasco.	6. Henry Haller.	10. R. T. Kampen.
3. A. M. Foley.	7. W. A. Davis.	11. J. C. Meyer.
4. Phillip Blass.	8. Chas. Moldauer.	12. J. J. Volkel.

Whereupon the parties in interest having filed a stipulation waiving the intervention of a jury, the said jurors were discharged from further consideration of the said cause; and after arguments from counsel for the parties respectively, said cause was submitted on a law point, and the court took time to advise.

Supplemental petition. Filed June 24th, 1885.

A. CUSIMANO & CO.
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

To the honorable the judges of the circuit court of the United States, fifth circuit, eastern district of Louisiana:

The plaintiffs herein, with leave of the court being first had and obtained, file this their amended petition, and herein say that, reiterating and affirming all and singular the allegations contained and made in their

original petition filed in this cause, they, in addition thereto and in amendment thereof, say:

That the apprais'ment made herein by merchant appraisers, made upon the application of petitioners, of the cargo of Valencia oranges per steamship Pontiac, was illegal, null, and fraudulent, and void and contrary to law, in this:

8 That one of the merchant appraisers appointed by the collector knew nothing of the value of Valencia oranges or of the charges thereon and so admitted; and for the further reason that none of the merchandize (Valencia oranges) nor any samples thereof was before submitted to or examined by the merchant appraisers, all of which was specifically set forth in plaintiffs' protest, filed with the defendant collector against said apprais'ment.

That all the subsequent apprais'ments of the subsequent shipments to that of the steamship Pontiac, set forth in the original petition herein, being based upon the aforesaid merchant apprais'ment (and the appeal to the Secretary of the Treasury refused because the merchants' appeal was binding), were also illegal and void.

Wherefore your petitioners pray leave to file this amended petition for judgment in their favor as contained in their original petition, to wit, for the sum of fourteen hundred $\frac{07}{100}$ dollars with legal interest from judicial demand and for costs, and for general relief.

(Signed) SINGLETON, BROWNE & CHOATE,
Atty's for Pet'r.

Order.

Let the within amended and supplemental petition be filed.
N. O., June 24th, 1885.
(Signed)

ALECK BOARMAN,
U. S. Judge.

Statement of facts agreed to by the parties, June 26, 1885.

A. CUSIMANO & Co.
vs.
A. S. BADGER, COLLECTOR. } No. 11029.

U. S. cir. court, E. D. of La.

9 *Statement of facts.*

It is admitted that the protests, appeals were regularly made and suit brought, all as alleged in the petitions herein, with dates, quantities, invoice prices, and liquidations.

It is admitted that Angelo Cusimano and Charles P. Adone will prove that the importations were made by the various steamships mentioned, and the proper entries made as per schedule annexed to their petition.

It is admitted that Manuel Diaz, Antonio Catala, Martin Givona Mazquita, and Joseph Mariand Bordehore would testify that the value of the cases of green fruit during the whole month of 1883 was eight ^{50} pesetas

(equal to one $\frac{64}{100}$ dollars) and the charges for cases, nails, paper, packing, labor, &c., average always six pesetas per case, equal to one $\frac{16}{100}$ dollars American money.

It is admitted that A. Cusimano and Chas. P. Adone will testify that the two merchant appraisers appointed by the Government to appraise the Valencia oranges consigned to plaintiff per steamship Pontiac did not examine and had no case of Valencia oranges before them for examination when they made their apprais'ment.

And that Ulysse Bassetti, one of said appraisers, never dealt in Valencia oranges and knew nothing of their value.

It is admitted that Charles Phelps, Howard Phelps, and Frank Phelps would testify that they are large importers of Valencia oranges received by them in the city of New York, and that they are the same parties who are interested on joint account in the Valencia oranges shipped to A. Cusimano & Co. as per schedule filed herein. That all their entries of Valencia oranges in the port of New York from December, 1883, to the end of March, 1884, were invoiced there as here, and the liquidations there of the same fruit in the same packages were six pesetas ($1.16) per case.

10 Defendant, without prejudice to his bill of exception to admissability of evidence such as is above stated, admits that above-named witnesses would testify as stated and waives appearance of said witnesses.

(Signed) A. H. LEONARD,
U. S. Att'y.

(Signed) SINGLETON, BROWNE & CHOATE,
Att'ys for pl'ff.

JUNE *26th*, 1885.

Bill exceptions. Def't.

A. CUSIMANO
vs.
BADGER, COLLECTOR. } No. 11029.

Circuit court U. S., eastern dist., La.

Be it remembered, that on trial of said cause the plaintiff offered evidence tending to show that the value fixed on goods imported by him was excessive, and that the appraisement of said goods was erroneous, to the reception of which evidence defendant objected on the ground that said goods were duly appraised and that the appraisement is final and conclusive in the absence of fraud, which is not alleged, and on the further ground that such evidence is not admissable under the allegations of plaintiff's petition, which objections were overruled by the court, and said evidence received, to wit, on ground: Because, in the opinion of the court, it is not necessary to allege fraud, and I do believe the statute, properly construed, forbids the plaintiff under his allegations to have this cause tried by the court. To which ruling def't excepts and tenders this bill of exception. He prays same be signed and made of record.

(Signed) ALECK BOARMAN,
U. S. Judge.

11 *Judgment.—Extract from the judgment book.*

Circuit court of the United States, fifth circuit and eastern district of Louisiana, April term, 1885.

NEW ORLEANS,
Monday, June 29th, 1885.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, district judge.

A. CUSIMANO & CO.
vs.
ALGERNON S. BADGER, COLLECTOR, &C. } No. 11029.

The parties in this cause having filed a stipulation waiving the intervention of a jury and submitted the cause to the court upon the issues of fact as well as of law; and the court having considered the evidence, and being advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiffs. It is therefore ordered, adjudged, and decreed that the plaintiffs, A. Cusimano & Co., a commercial firm domiciled and doing business in the city of New Orleans, State of Louisiana, and composed of Angelo Cusimano and Charles P. Adone, both residents of New Orleans, the former a subject of the Kingdom of Italy and the latter a citizen of Louisiana, do have and recover of and from the defendant, Algernon S. Badger (collector of the port of New Orleans), who resides in New Orleans, the sum of fourteen hundred and $\frac{7}{100}$ dollars ($1,400 $\frac{7}{100}$,) with 5% per annum interest thereon from the 16th day of May,
12 1885, until paid, and all the costs herein expended or incurred to be taxed; and considering that said Algernon S. Badger is collector of customs for the port of New Orleans, and that the action was brought against him in his official capacity for money unlawfully collected from plaintiffs and by him paid into the Treasury of the United States in performance of his official duty as such collector of customs, it is so certified that no execution or other writ for the enforcement of this judgment issue against the said defendant, but that the same be paid out of the proper appropriation from the Treasury of the United States as provided by law in such cases.

Judgment rendered June 29th, 1885.
Judgment signed July 8th, 1885.
(Signed) ALECK BOARMAN,
Judge.

Motion and order for writ of error. Entered and filed 1st July, 1885.

A. CUSIMANO & CO.
vs.
A. S. BADGER, COLLECTOR, &C. } No. 11029.

On motion of A. H. Leonard, U. S. attorney for said district, and on representing to the court that the defendant is aggrieved by the final judgment herein rendered against him on the 29th day of June, A. D. 1885, is advised there is error therein to his prejudice, and is desirous that a

writ of error to operate as a supersedeas be granted him therefrom, it is ordered that a writ of error to operate as a supersedeas be allowed as prayed for and be made returnable to the next October term of the Supreme Court of the United States and according to law.

13 UNITED STATES OF AMERICA,
Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, Clerk's Office:

I, Edward R. Hunt, Clerk of the Circuit Court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 12 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of A. Cusimano & Co. *vs.* A. S. Badger, collector, &c., No. 11029 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30 day of September, A. D. 1885.

[SEAL.] E. R. HUNT,
Clerk.

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30 day of September, A. D. 1885.

DON A. PARDEE,
Judge.

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between A. Cusimano & Company, a commercial firm composed of Angelo Cusimano and Charles P. Adone, plaintiffs, and Algernon S. Badger, collector of the port of New Orleans, defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] E. R. HUNT,
Clerk of the Circuit Court of the United States,
5th Circuit and Eastern District of Louisiana.

Allowed by
———— ————,
———— ————.

15 THE UNITED STATES OF AMERICA,
Circuit Court of the United States, Eastern District of Louisiana:

The President of the United States to A. Cusimano & Company, a commercial firm composed of Angelo Cusimano and Charles P. Adone, of the city of New Orleans, Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Algernon S. Badger, collector of customs of the port of New Orleans, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Algernon S. Badger, collector of customs, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this third day of July, in the year of our Lord one thousand eight hundred and eighty-five.

EDWARD C. BILLINGS,
Judge.

16 (Indorsed:) United States circuit court. No. 11029.. Algernon S. Badger, plaintiff in error, *vs.* A. Cusimano & Co., defendants in error. Citation. Marshal's return.

Service of the within citation accepted as of the third July, 1885.

SINGLETON, BROWN & CHOATE,
Att'ys for Cusimano & Co.

17 (Indorsement on cover.) No. 179. Algernon S. Badger, collector of the port of New Orleans, plaintiff in error, vs. A. Cusimano & Company, a commercial firm composed of Angelo Cusimano and Charles P. Adone. E. Louisiana, C. C. U. S. Filed October 24, 1885.

JAN 28 1889
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

No. 179.

ALGERNON BADGER, COLLECTOR, ETC., PLAINTIFF IN ERROR,

versus

A. CUSIMANO & CO., ETC., DEFENDANT IN ERROR.

STATEMENT OF PLEADINGS.

CHAS. B. SINGLETON,
RICHARD H. BROWNE.

January 9, 1889.

Thomason, Printer, No. 33 Natchez Street.

SUPREME COURT OF THE UNITED STATES

No. 179.

ALGERNON BADGER, COLLECTOR, ETC., PLAINTIFF IN ERROR,

versus

A. CUSIMANO & CO., ETC., DEFENDANT IN ERROR.

STATEMENT OF PLEADINGS.

A. Cusimano & Co., fruit importers and dealers of New Orleans, sue Algernon S. Badger, Collector of the Port, for fourteen hundred 7-100 dollars, with legal interest from judicial demand (May 16, 1885) for this:

1. They allege that during the years 1883 and 1884 that they imported five cargoes of Valencia oranges into the Port of New Orleans, the invoice value of the fruit being 177,310 peseutas, and the charges, value of cases, nails, packing, bands, costs of transportation, etc., 120,990 peseutas, making a total invoice of fruit and charges of 298,300 peseutas. Tr. pp. 1 and 3.

2. That this fruit was entered at its true invoice

value and the charges at the true invoice value. Tr. p. 1.

3. That notwithstanding this, and the protest and remonstrance of said importers, the Collector, not pretending there was any mistake or fraud in the invoice values of the fruit, or that its market value was not properly stated, caused an appraisement to be made, whereby the value of the fruit was increased 36,271.15 pesetas and the invoice value of the charges decreased 36,271.15 pesetas, equal to $7,000.33 in American coin, upon which 20 per cent. duties were charged, and plaintiffs were forced to pay said additional sum. Tr. pp. 1 and 2. See Exhibit "Valencia Oranges," Tr. p. 3.

4. That in the case of the fruit imported on the first named steamship (the Pontiac) a merchants' appraisement was made, and the duties on all the other importations by the steamships Norfolk, North Anglia, Vindolano and Ehrenfels, were based upon the aforesaid merchants' appraisement, and liquidated accordingly. Tr. p. 5.

5. That upon the liquidation of the entry of the cargo of the Pontiac by the Customs Department at New Orleans, petitioners appealed, within thirty days thereafter, to the Secretary of the Treasury, who, on the 18th of February, 1884, decided that while it appeared that the "*the fruit in question was invoiced at a value which* " *properly represented its market value; but that the value* " *of the boxes, packing, etc. was excessive and was re-* " *duced by the appraiser, and the value of the fruit ad-*

"*vanced to the same extent,*" (italics ours), and affirmed the decision of the Collector. Tr. p. 2.

6. That all the subsequent appraisements of the importations, subsequent to that of the Pontiac, were based upon the merchants' appraisement made in the case of the Pontiac, and the Secretary of the Treasury, upon the appeals therefrom, refused to grant relief upon the ground that the merchants' appraisement was binding. Tr. p. 5.

7. Petitioners allege that the merchants' appraisement was illegal, fraudulent and void, and contrary to law, for the reasons:

(*a*) That said appraisers had none of the merchandise, nor any samples thereof (Valencia oranges) submitted to them by the Collector or examined by them.

(*b*) That one of the merchant appraisers appointed by the Collector knew nothing of the value of Valencia oranges or of the charges thereon, and so admitted, and that all this was specifically set forth in plaintiff's protest, filed with the Collector. Tr. p. 5.

8. The answer is a general denial.

Statement of Facts as Appears of Record.

1. The jury was called and sworn, and then waived in writing, and the cause submitted to the Court upon the pleadings and facts. Tr. p. 4.

2. It was admitted that the protests and appeals

were regularly made and suit brought, all as alleged in the petition herein, with dates, quantities, invoice prices, and liquidations.

3. It was admitted that Angelo Cusimano and Charles P. Adoue will prove the importations by the various steamships mentioned, and the proper entries made as per schedule annexed to their petition (marked Valencia Oranges).

4. It was admitted that Manuel Diaz, Antonio Calata, Martin Givona Masquita, and Joseph Marian Bordehose, would prove the value of cases of green fruit was 8.50 pesetas, ($1.64), and the charges for cases, nails, packing, paper, labor, etc., averaged always 6 pesetas per case ($1.16).

5. It was admitted that Cusimano and Adoue would testify that the two merchant appraisers appointed by the government to appraise the oranges of plaintiff per steamship Pontiac, did not examine, and had no case of Valencia oranges before them for examination, when they made their appraisement, and that Ulysse Bassetti, one of said appraisers, never dealt in Valencia oranges and knew nothing of their value.

6. It was admitted that Charles Phelps, Howard Phelps and Frank Phelps would testify that they are large importers in New York, of Valencia oranges, that they were interested on joint account in the oranges described in exhibit "Valencia Oranges," and that all their entries of Valencia oranges from December, 1883, to the end of March, 1884, were invoiced there, as

Cusimano & Co. invoiced them at New Orleans, and the liquidations of the same fruit in the same packages were 6 pesetas ($1.16) per case. Tr. pp. 5 and 6.

7. That there was judgment by the Court for plaintiff. Tr. p. 7.

Argument.

Under the recent decisions of this Court, we need not make any lengthy argument in this cause.

There can be no reasonable doubt that the appraisement and merchants' appraisement of the invoice of Valencia oranges per steamship Pontiac were illegal and wrongful, if not fraudulent.

The course pursued by the Collector seems almost marked by malice; certain it is, that it tended to vex and harass the importer to the utmost.

This is evident from a simple statement of the facts.

There was no pretension on the part of the Collector that the importer had made any false valuation, concealed any fact, or tried to deceive the Customs authorities in any respect. The invoice value of the fruit was its true market value. The invoice values of the packing, etc., were correct, being exactly the same as those on entries in New York of the same kind and quality of fruit, brought from the same place, packed in the same manner and imported at the same time. Those liquidations being 6 pesentas per case.

The Secretary of the Treasury himself admits that

" the fruit in question was invoiced *at a value which* " *represented the proper market value*," (italics ours).

Hence the very first step, *i. e.* to appraise the fruit, was an injustice to the importer.

Now the Statute of March 3, 1883, § 7 (Rev. Stats. at Large, p. 523), expressly declares "that hereafter none " of the charges imposed by Sections 2907, 2908, or " any other provisions of the existing law, shall be es- " timated in ascertaining the value of goods to be im- " ported, nor shall the value of the usual and necessary " sacks, crates, boxes, or covering of any kind be esti- " mated as part of their value."

This Statute was held in Olenteuffer vs. Robertson (116 U. S. 510), to have repealed § 14 of the Act of 1874 (18 Stat. at Large, p. 188).

So that the items specified in Sec. 2907 of the Revised Statutes and in Sec. 14 of the Act of 1874, being charges and being eliminated as part of the dutiable value of goods, there was no excuse for the Collector's appraisement, nor for the appraisers to look at or consider anything beyond the market value of the fruit.

Yet, in the face of these explicit statutory enactments, the Collector caused this invoice of fruit to be appraised, and these appraisers, in utter disregard of their duty under the law, deducted from the invoice entries and values of "the charges" a certain amount: 6730.15 pesetas, and increased the value of the fruit by the same amount, to-wit: 6730.15 pesetas.

Against that appraisement the importer protested,

and asked for a merchants' appraisement in accordance with Sec. 2930 of the Revised Statutes.

What did the Collector do ? He complied with the request; but how ? The law required him to select "two discreet and experienced merchants * * * "*familiar with the character and value of the goods in* "*question, to examine and appraise the same, etc.,*" (italics ours).

He selected two merchants. *One* of them disqualified by the fact that he never dealt in Valencia oranges and knew nothing of their value. Hence, "not familiar with the character and value of the goods in question."

He did not select or furnish them with any sample or package of the invoice or designate any packages of them for their inspection, examination and appraisement (Sec. 2901), nor did either of these merchant appraisers examine any sample or package of this invoice, as Sec. 2930 requires, for the purpose of their appraisement.

Therefore, at every step there was a palpable violation of his duty, and a more inexcusable and flagrant disregard of the plain provisions of the law will rarely be found.

This course was the more wrongful and oppressive to the importer because it was not so easy to find a way of relief. For this reason, those values (charges) which were expressly exempted by the statute from duty, were transferred to the fruit invoice value, which was admittedly at its proper "market value," and while

it appeared as if it was an increase in the "dutiable value," it was simply a covert way of making the importer pay duty on 6730.15 pesentas of the charges, which were not liable to duty at all.

The Collector compelled the importer to pay, which he did under protest.

The two cases decided by this Court and reported in 123 U. S. pp. 356 and 369 (Oelbermann vs. Merritt, and Mustin vs. Cadwalader), settle the right of the importer to recover the excess of duties illegally exacted in the case of the steamship Pontiac.

Now as to the remaining four invoices, per steamships Norfolk, North Anglia, Vindolano and Ehrenfels, following in quick succession the importation on the Pontiac, the same basis of liquidation of the invoice values was used as in the case of the steamship Pontiac, but no merchants' appraisement was had, the importer deeming it sufficient to make his protest that the appraisement was illegal and fraudulent.

Now we are aware that this Court decided in the case of Hilton vs. Merritt (110 U. S. 97), that considering all the Sections of the Revised Statutes on the subject, embracing §§ 2900, 2902, 2906, 2922, 2929, 2930, 2949 and 3011, that the meaning of those Sections was that "the appraisement of the customs officers should be "final," and you further held, "that the valuation was "not open to question in an action at law, so long as "*the officers acted without fraud*, and '*within the* power "conferred upon them by the statute.'"

The question then to be solved, so far as the four importations of December 12 and 24 (1883) and January 10 and 22 (1884) are concerned, is, did the officers act without fraud and within the power conferred upon them by the statute?

If they acted fraudulently, or exceeded their powers, as prescribed by the statute, the appraisements and the liquidations were equally null and void.

And just here it is well to look at the dilemma in which the importer was placed by their acts.

If he considered that this appraisement was legally in reference to a dutiable value, he must ask for a merchants' appraisement. He had already tried that, and the result was improper appraisers were selected and an illegal appraisement made. There was, so far as the importer could see, illegality at every step. The initial step being a gross wrong, as the fruit was *invoiced at its proper* market value. Admittedly so. There were no duties upon the charges, and under the law could be none. Yet the appraisers, acting beyond "the power conferred upon them by the statute," *enhanced* the invoice value of the fruit by adding thereto 6730.15 pesetas, *taken from* the charges, and this unwarranted and illegal act was approved by the Collector. What relief could he expect from a reappraisement?

Or, must he consider the matter as coming within the meaning of Section 2931, as one involving "the rate and amount of duties," "and the dutiable costs and

charges therein?" and not a question of "dutiable value." For, although the invoice value of the "charges" were not made dutiable "*eo nomine*," by them, yet they were in reality (by the illegal act of the appraisers and Collector) made to pay duty—the fruit being invoiced and entered by the importer at its proper market value.

If it were a question of "dutiable value," the importer was required by law to take certain proceedings to obtain relief; if a matter of "dutiable costs and charges" or "rate and amount of duties," then entirely different steps were necessary.

In fact, it seemed to be neither the one nor the other, but a sort of hybrid,—for the valuations were made of both "dutiable" and "non-dutiable" articles —the latter not as such, but under the astute legerdemain of the Collector and his appraisers—that which was "non-dutiable" was metamorphosed into "dutiable." Is it surprising that the importer failed to fully comprehend this curious conduct of the Customs authorities?

He had, in all good faith, entered his importations at their proper market value, making his entries and producing his original invoices in conformity to law. §§ 2899, 2900.

There was no pretense or claim on the part of the Collector that invoice values of the fruit were not the proper market value of them.

The invoice values of the "charges" are shown by

the testimony to be correct, for invoices of the charges on the same kind and quality of fruit imported into New York at the same time, was liquidated there at the same values as Cusimano & Co. entered the "charges" on their fruit. It was also shown by other witnesses that these "charges" were correctly invoiced.

The duty of the Collector was to have the *fruit* appraised, if he deemed it necessary (§ 2900); and of the appraisers, "by all reasonable ways and means in his "or their power to ascertain, estimate and appraise the "true and actual market value and wholesale price, "any invoice or affidavit thereto to the contrary, not-"withstanding," § 2902.

What were they to ascertain and appraise? The *market value* of the *fruit*—not the charges.

We repeat, this invoice value of the fruit was correct,—admitted to be correct.

Hence, the appraisers, in making the appraisement, and the Collector, in approving it, and making the liquidations in accordance therewith, wherein he saw that the appraisers had only increased the invoice value of the fruit by deducting the amount of that increase from the "charges," acted in bad faith and in direct violation of the law. He knew that to attempt to make these "charges" liable to duty was utterly void, and he therefore sanctioned, by his act and liquidation, the increase of the invoice value of the fruit, when it is admitted that it was correct, and the only pretense set up is, that the charges were invoiced at an *excessive*

rate. It was not carelessness or irregularity in the discharge of their duties, but an assumption of "powers" not "conferred by the statute."

We do not desire to characterize the conduct of these officials too harshly, but it was a gross violation of their duty and a grave wrong to the importer. No moral turpitude, perhaps, but in reality fraud in the eye of the law.

Upon what theory can their acts be explained which would eliminate the conclusion of fraud, or that would bring them within the powers conferred by the statute?

The Circuit Court heard all the testimony and found the issues of fact raised in the pleadings in favor of the importer.

One of those issues was the illegal and fraudulent acts, *vel non*, of the customs officials.

The court was satisfied that the defendant in error had made out his case fully.

There was no special finding of fact, and under the statute (§§ 700 and 649) it is for this Court to say whether the matter is open at all to question the sufficiency of the facts in the case.

We feel that the court *a qua* rendered substantial justice in the premises, and we respectfully ask this Court to affirm that judgment.

Respectfully submitted,

CHAS. B. SINGLETON,
RICHARD H. BROWNE.

January 9, 1889.

Supreme Court, U.S.
FILED,
JAN 21 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

ALGERNON S. BADGER, COLLECTOR, ETC., plaintiff in error,
vs.
A. CUSIMANO AND CHARLES P. ADONE. } No 179.

WM. A. MAURY,
Assistant Attorney-General.

BRIEF FOR THE PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1888.

ALGERNON S. BADGER, COLLECTOR, ETC., plaintiff in error,
vs.
A. CUSIMANO AND CHARLES P. ADONE. } No. 179.

BRIEF FOR THE PLAINTIFF IN ERROR.

The plaintiff in error was sued on 16th May, 1885, for the sum of $1,400.07, with interest, it being the amount of duties which, it is claimed, were illegally exacted from the defendants in error by the plaintiff in error, as collector of the port of New Orleans.

During November and December, 1883, and January, 1884, Cusimano and Company, the defendants in error, made six different importations of Valencia oranges, amounting in the aggregate to 20,165 cases.

The invoice value of said oranges was 177,310 pesentas, and the invoice value of the charges (composed of cases, nails, packing, bands, cost of transportation, etc.) was 120,990 pesentas.

The importations were entered, respectively, at their invoice values, both as to the merchandise and charges thereon.

The importers, being dissatisfied with the appraisement, appealed to merchant appraisers, who reduced the invoice values of the charges and made corresponding additions to the invoice values of merchandise, the effect of which was to increase the value of the merchandise contained in the 20,165 cases by 36,271.15 pesentas, equal in American coin to $7,000.33.

On this amount of $7,000.33 an additional duty of 20 per cent. was assessed, amounting to $1,400.07, the sum sued for.

The facts of the several entries, appraisements, and liquidations are presented in a tabulated form, as an exhibit of the petition. (p. 3.)

The action of the collector complained of in the original petition seems to be in having unreasonably and arbitrarily resorted to an appraisal when he should have been satisfied with the invoice, the same standing unimpeached (pp. 1, 2); and in having added the amounts deducted from the invoice values of charges to the invoice values of merchandise and assessed duties on the amounts so added.

But in the amended petition it is charged that the appraisement was "illegal, null, and fraudulent, and void, and contrary to law," in this,

> That one of the merchant appraisers appointed by the collector knew nothing of the value of Valencia oranges or of the charges thereon, and so admitted; and for the further reason that none of the merchandise (Valencia oranges) nor any samples thereof was before submitted to or examined by the merchant appraisers, all of which was specifically set forth in plaintiff's protest, filed with the defendant collector against said appraisement.
>
> That all the subsequent appraisements of the subsequent shipments to that of the steam-ship *Pontiac*, set forth in the original petition herein, being based upon the aforesaid merchant appraisement (and the appeal to the Secretary of the Treasury refused because the merchants' appeal was binding), were also illegal and void. (Pp. 4, 5.)

The original petition was met by a denial of all its statements (p. 3), but there was no answer or pleading of any kind to the amended petition.

A jury was waived by stipulation (pp. 4, 7), and the case was submitted to the court upon the following "statement of facts:"

It is admitted that the protests, appeals, were regularly made and suit brought, all as alleged in the petitions herein, with dates, quantities, invoice prices, and liquidations.

It is admitted that Angelo Cusimano and Charles P. Adone will prove that the importations were made by the various steam-ships mentioned and the proper entries made, as per schedule annexed to their petition.

It is admitted that Manuel Diaz, Antonio Catala, Martin Givona Mazquita, and Joseph Mariand Bordehore would testify that the value of the 50 cases of green fruit during the whole month of 1883 was eight pesetas (equal to one $\frac{44}{100}$ dollars), and the charges for cases, nails, paper, packing, labour, &c., average always six pesetas per case, equal to one $\frac{10}{100}$ dollars American money.

It is admitted that A. Cusimano and Chas. P. Adone will testify that the two merchant appraisers appointed by the Government to appraise the Valencia oranges consigned to plaintiff per steam-ship *Pontiac* did not examine, and had no case of Valencia oranges before them for examination, when they made their appraisement.

And that Ulysse Bassetti, one of said appraisers, never dealt in Valencia oranges and knew nothing of their value.

It is admitted that Charles Phelps, Howard Phelps, and Frank Phelps would testify that they are large importers of Valencia oranges received by them in the city of New York, and that they are the same parties who are interested on joint account in the Valencia oranges shipped to A. Cusimano & Co. as per schedule filed herein. That all their entries of Valencia oranges in the port of New York from December, 1883, to the end of March, 1884, were invoiced there as here, and the liquidations there of the same fruit in the same packages were six pesetas ($1.16) per case.

Defendant, without prejudice to his bill of exception to admissibility of evidence such as is above stated, admits that above-named witnesses would testify as stated, and waives appearance of said witnesses.

A. H. LEONARD,
U. S. Att'y.

SINGLETON, BROWNE & CHOATE,
Att'ys for Pl'ff.

JUNE 26TH, 1885.

(Pp. 5, 6.)

There is an exception in the record stating the defendant's objection to the admissibility of the plaintiff's evidence touching the appraisement, on the ground (1) that the evidence offered did not tend to show fraud, and (2) was not admissible under the allegations of plaintiff's petition. (p. 6.)

The record states that, "the court having considered the evidence and being advised in the premises, *finds the issues of fact raised by the pleadings in favor of the plaintiffs.*" (p. 7.)

The court then proceeds to give judgment for the plaintiffs for the amount demanded with interest as demanded. (p. 7.)

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that the evidence by which it was sought to impeach the appraisement on which the alleged excessive liquidation was based was incompetent and was inadmissible for any such purpose, there being no pretense of fraud in the appraisement.

ARGUMENT.

Apart from the admissions "that the protests, appeals, were regularly made and suit brought, all as alleged in the petitions herein, with dates, quantities, invoice prices, and liquidations," what is called the "*statement of facts*" is no more than some of the evidence or *data* upon which the finding of the court was to be made—for it will be observed that this "statement of facts" does not purport to set forth *all* the evidence that was submitted to the court—and hence it is recited in the judgment entry that "the court * * * *finds the issues of fact raised by the pleadings in favor of the plaintiffs*" (p. 7).

This being a general finding, in the nature of a general verdict, nothing is open under this writ of error but the points presented by the bill of exceptions, unless it be the absence from the record of anything whatever to support the judgment. (P. 6.)

The bill of exceptions states "that on trial of said cause the plaintiff offered evidence tending to show that the value fixed on goods imported by him was excessive and that the appraisement of said goods was erroneous, to the reception of

which evidence defendant objected on the ground that said goods were duly appraised and the appraisement is final and conclusive in the absence of fraud, which is not alleged, and on the further ground that such evidence is not admissible under the allegations of plaintiff's petition, which objections were overruled by the court, and said evidence received, to wit, on ground: Because, in the opinion of the court, it is not necessary to allege fraud, and I do believe the statute, properly construed, forbids the plaintiff under his allegations to have this cause tried by the court."

Looking, then, at the evidence introduced as to the excessiveness and erroneousness of the merchants' appraisement, in the light of the decision of this court in *Hilton* v. *Merritt* (110 U. S., p. 97), it would seem perfectly clear that the court below erred in admitting and considering the evidence offered, for this court laid down in that case that, fraud apart, the appraisement is conclusive.

But, aside from the bill of exceptions, there is nothing in the record to support the judgment, all the issues on which the findings are based being immaterial.

The grounds relied on in the original petition, namely, that there was no reason why the collector should not have liquidated the duties on the invoice values, and that the fact of increasing the invoice values of the merchandise by the

amount of the deduction from the invoice values of the charges was illegal and wrongful, being the assessment of duties on charges, which are exempt by law.

As to the complaint that the collector did not accept the invoice values, it is enough to say that the law makes it the duty of the collector to have every importation appraised (Rev. Stat., § 2901) regardless of the invoice (Rev. Stat., 2902).

As to the act of the appraisers in adding to the invoice value of each importation the amount deducted from the invoice value of charges for excessiveness, it must be presumed that the excessiveness in the value of charges coincided with the undervaluation in the invoice value of the merchandise.

It will not be imputed to sworn appraisers to have added arbitrarily to the invoice value, nor is it pretended here that there was fraud in the appraisements. The appraisers having acted within their authority, what they did is made conclusive by the law (Rev. Stat., § 2930, *Hil-*

ton v. *Merritt, supra*). Every presumption is in favor of appraisements and liquidations (*Tire and Spring Works Company* v. *Spalding*, 116 U. S., p. 547). If the importer would impeach them he must make good his charges beyond a doubt.

It is more than probable, indeed it must be assumed, that the appraisers in this case satisfied themselves that the overvaluation of the charges was made to support the undervaluation of the merchandise and in furtherance of a plan laid to defraud the revenue. Such a practice has been frequent since the passage of the act of 1883, making charges of all sorts non-dutiable.

Passing now to the supplemental petition, one of the grounds taken there is that one of the merchant appraisers "knew nothing of the value of Valencia oranges, or of the charges thereon, and so admitted" (p. 5.)

But it is not alleged or anywhere claimed that this appraiser was not a dealer in oranges generally. The presumption must be that he was, because it will not be presumed that a public officer violated the law. (*Tire and Spring Works Company* v. *Spalding*, *supra*.)

This court has laid down that substantial compliance with the law (Rev. Stat., § 2930) is all that is necessary. In *Oelbermann* v. *Merritt* (116 U. S. R., 367) the court used this language:

> We do not lay down any absolute or comparative standard of familiarity with the character and value of the goods which must be applied to carry out the requirements of the statute. There must be in every case a substantial compliance with the statute. This does not necessarily require the highest degree of such familiarity. There must be, in good faith, in every case, the appointment of a person having the qualifications prescribed by the statute.

It seems to be going very far to say that a fruiterer, dealing in oranges, is disqualified as an appraiser of Valencia oranges because his traffic does not extend to fruit of that kind gathered in Valencia.

Again, it is said that the appraisers made the appraisement without having before them any of the merchandise to be appraised, or any samples thereof (p. 5).

This objection stands upon the mere letter of the law (Rev. Stat., § 2901).

No doubt the law says that at least one package, or one in each ten packages, shall be "*opened, examined, and appraised.*" But this is

but a means to an end, namely, the ascertainment of the value of the thing to be appraised. If this end can be reasonably attained without breaking a package, can it be necessary that a package, or one in every ten packages, of an importation should be broken in order to produce a literal conformity to the law?

Undoubtedly, as in *Oelbermann* v. *Merritt* (*supra*), where the importation is of fabrics, the appraiser must make an actual examination and inspection of them, because in no other way can a proper valuation be made. But we do not understand that case to decide that actual examination and inspection *must* be made where no useful purpose can be served. Surely an examination and inspection of packages of eggs, if dutiable, would not be necessary, and yet the *letter* of the statute requires such examination and inspection.

Oranges are nature's product, not the work of men's hands. Ocular inspection is not necessary to determine what a merchantable orange is.

If there is any ground for damage allowance the importer must claim it, and the appraisers

can proceed on the presumption that the importation comes up to the standard of the invoice.

The reasoning of the court in *Greely* v. *Thompson* (10 How., 239) seems to point in the direction of our view of the statute, although it is true that the court held the appraisement invalid in that case because the appraisers had not given the merchandise such an examination as the law called for. But a stronger authority in favor of our contention is *Sampson* v. *Peaslee* (20 How., 571), which arose on an importation of Manilla hemp.

It was contended that the examination of the hemp merely through a slit in the matting covering it, was superficial and in disregard of the law, and did not warrant the assessment of an additional duty because the appraised value was more than ten per cent. in excess of the entered value, but this court sustained the appraisement, holding that if the examination was such "*as is usually made in buying and selling the article, and was satisfactory to the merchant appraiser, it was not open to the plaintiffs to show that he adopted a*

mode of examination insufficient to detect fraudulent packing or diversities in the qualities of the different parts of the bales of hemp" (p. 580).

In the absence of any claim for damage allowance the appraisers, in the case at bar, had a right to assume that the several importations were good, merchantable oranges. The law is not supposed to require the doing of vain, any more than impossible, things.

It follows, then, that the findings of the court on these immaterial issues afforded no foundation for a judgment against the plaintiff in error.

It is therefore submitted that the judgment should be reversed, with instructions to the court below to dismiss the petition.

WM. A. MAURY,
Assistant Attorney-General.

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